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CAUSE NO. 12,764

THE STATE OF TEXAS § IN THE DISTRICT COURT OF
VS. § TITUS COUNTY, TEXAS
BILLY JOE WARDLOW § 76TH JUDICIAL DISTRICT

STATEMENT OF FACTS

MOTION FOR DISCOVERY, PRODUCTION

AND INSPECTION OF EVIDENCE NO. 1

October 11, 1994

VOLUME 7 of 43 volumes

**FILED IN
COURT OF CRIMINAL APPEALS**

OCT 11 1995

Troy C. Bennett, Jr., Clerk

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1 VOLUME 7

2 MOTION FOR DISCOVERY, PRODUCTION

3 AND INSPECTION OF EVIDENCE NO. 1

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1 VOLUME 7

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2 THE STATE OF TEXAS S IN THE DISTRICT COURT OF
3 VS. S TITUS COUNTY, TEXAS
4 BILLY JOE WARDLOW S 76TH JUDICIAL DISTRICT

5
6 STATEMENT OF FACTS

7 MOTION FOR DISCOVERY, PRODUCTION
8 AND INSPECTION OF EVIDENCE NO.1

9 October 11, 1994

10 VOLUME 7 of 43 volumes

11
12 Before Honorable Gary R. Stephens

13 Judge by Judicial Assignment

14 (Venue changed from Morris County, Texas)

15
16 APPEARANCES

17
18 ATTORNEYS FOR THE STATE OF TEXAS:

19 MR. RICHARD TOWNSEND
20 District Attorney
21 Morris County Texas
22 Morris County Courthouse
23 Daingerfield, Texas 75638

24 and

25 MR. RANDY LEE
26 Assistant District Attorney
27 Cass County Texas
28 P.O. Box 940
29 Linden, Texas 75563

1 ATTORNEYS FOR THE DEFENDANT:

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7

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1 On the 11th day of October, 1994, the
2 above-entitled and numbered cause came on for hearing
3 before said Honorable Court, Judge Gary R. Stephens of
4 Midlothian, Texas, serving by judicial assignment in the
5 District Court of Titus County, Texas, on change of venue
6 from Morris County, Texas, and the following proceedings
7 were had:

8 THE COURT: Let's get on the
9 record.

10 I do not have the jacket, I believe it's
11 the Cause No. in Titus County, Cause No. 12,764, "State
12 Vs. Billy Joe Wardlow."

13 Let the record reflect that both of the
14 attorneys for the Defendant and the Defendant himself is
15 present in the courtroom and that Mr. Richard Townsend
16 is present for the State of Texas.

MR. TOWNSEND: Yes, Your

1 Honor.

2 THE COURT: Does the Defense
3 have any objection?

4 MR. OLD: None, Your Honor.

5 THE COURT: I will appoint Mr.
6 Lee and I understand that Mr. Lee has agreed to serve
7 without additional compensation for Morris or Titus
8 County.

9 Mr. Old, you had orally requested
10 permission from the Court to have Co-Counsel?

11 MR. OLD: That's correct, Your
12 Honor.

13 THE COURT: And you were
14 present at our general voir dire, you had Lance Hinson
15 present as Co-Counsel and at this point I will appoint
16 him as Defense Co-Counsel and I will pay him in
17 accordance with the discussion we had last time I was in
18 town.

19 MR. OLD: Thank you, Your
20 Honor.

21 MR. HINSON: Thank you, Your
22 Honor.

23 THE COURT: Do we have any
24 other matters to be taken up before we proceed with voir
25 dire?

1 MR. OLD: Yes, Your Honor.

2 THE COURT: Mr. Old?

3 MR. OLD: Your Honor, at
4 approximately 10:00 o'clock the State supplemented their
5 Witness List that by order signed May 5th, 1994 Judge
6 Thorpe ordered them to file prior to jury voir dire.

7 They added three names, one which is
8 Tonya Fulfer, a Jim Stewart and a Joe McKinney.

9 These three names have been supplemented
10 late in that voir dire of the jury started Thursday of
11 last week, this being the 10th of October and I believe
12 last Thursday being the 7th. We are surprised by this
13 supplementation, it effects our ability to go forward on
14 voir dire in that we only know who one of these persons
15 is, the other two people I have no idea in this world.
16 We don't have addresses for them or locations or numbers
17 for them.

18 I cannot intelligently question a juror
19 about their knowledge of a relationship with or the
20 effect of these three people testifying without further
21 investigation.

22 Additionally, Tonya Fulfer is also
23 indicted with the same offense that Mr. Wardlow is under
24 a separate number and indictment.

25 I received I believe by mail last

1 Thursday afternoon a statement informing me that the
2 State had made a deal with Miss Fulfer and that she would
3 be pleading to the offense of "Murder" as opposed to
4 "Capital Murder" and that if I understood the agreement
5 correctly Mr. Townsend and her attorney had agreed that
6 they would let the jury determine her punishment but it
7 being a non-capital offense.

8 Tonya Fulfer is in fact an accomplice
9 witness. The fact that she had not been named as a
10 witness prior to today I felt comfortable with I would
11 not be confronted with her as a witness. I have not
12 prepared myself to voir dire this jury on the effect of
13 accomplice witnesses and the accomplice witness rule as
14 to testimony of an accomplice.

15 We are surprised by the naming of these
16 people and are not prepared to go forward at this time
17 and first would request a mistrial.

18 THE COURT: Your request for
19 a mistrial is denied.

20 MR. OLD: We would request a
21 continuance this morning until we can determine who these
22 people are and where they are located and identified them
23 so that we may intelligently question the juror as to
24 their knowledge of them.

25 THE COURT: Mr. Old, I'm not

1 familiar with the order that you referred to from Judge
2 Thorpe. I'm going to take you at your word, I don't
3 distrust you at all, so I'm going to assume that -- well,
4 again tell me when was the State supposed to give you the
5 information?

6 MR. OLD: Your Honor, there
7 is an order in the file, I have a copy of what has been
8 furnished me as an order.

9 It is granted and then Judge Thorpe next
10 to his signature made a qualification as to when.

11
12 (Handed to the Court.)

13
14 THE COURT: You have handed
15 me the last page of the order dated May 5th, 1994 signed
16 by Judge Thorpe ordering that the Defendant's Motion for
17 list of State witnesses is granted so I guess we need to
18 see the motion to see what the actual motion itself
19 requests.

20 Now, this was a motion filed prior to
21 you being appointed as Counsel?

22 MR. OLD: Yes.

23 THE COURT: But you did, I
24 assume rely on this motion?

25 MR. OLD: Yes.

1 THE COURT: Mr. Townsend,
2 while we are looking up the order and motion would you
3 like to respond?

6 MR. TOWNSEND: Those are two
7 people that were in jail during the period of time when
8 Mr. Wardlow was in jail.

14 THE COURT: Are these
15 witnesses you intend to use for punishment?

16 MR. TOWNSEND: If they are
17 used -- I don't anticipate using them at all but if they
18 are used at all it would be the punishment stage.

19. THE COURT: I understand that
20. Tonya Fulfer, what I will refer to as the "Co-Defendant",
21. and I heard from Mr. Old that you had made a deal with
22. Tonya Fulfer and her lawyer, is that correct?

23 MR. TOWNSEND: I believe from
24 what Mr. Old said he was aware of it last Thursday.

MR. QLD: Last Thursday

1 afternoon after voir dire in this case was concluded it
2 was in my mail when I returned.

3 THE COURT: So you don't
4 dispute what Mr. Old told me about the agreement?

5 MR. TOWNSEND: So far as the
6 Thursday he himself --

7 THE COURT: No. I'm talking
8 about the agreement itself to plead guilty to murder and
9 have a jury assess punishment?

10 MR. TOWNSEND: No. I have no
11 dispute.

12 THE COURT: Let me read that
13 motion, I'll get back on the record.

14 Let's go off the record.

16 (Off the record discussion.)

18 THE COURT: Let's get back on
19 the record.

20 Mr. Townsend, we were off the record for
21 a moment and you began to tell Mr. Old who the witnesses
22 were.

Would you please start again, sir?

24 And let the record reflect Mr. Townsend
25 is talking in the courtroom in the presence of Mr.

1 Wardlow to Mr. Wardlow's attorney.

2 Mr. Townsend.

3 MR. TOWNSEND: Joe McKinney

4 is one of the witnesses, potential witnesses listed.

5 He's a lifelong Morris County citizen, he's currently
6 residing in TDC.

7 We revoked his probation for a felony
8 theft charge I believe. It was either that or possession
9 of drugs, that I can find out for sure for you but I
10 believe it was a theft.

11 In any case he's a convicted felon.

12 Jimmy Stewart I don't recall as much
13 about other than he is a Morris County resident. I
14 cannot give you his whereabouts at this time because I
15 don't know them. In order for us to use him as a witness
16 we are going to have to be able to locate him ourself.

17 MR. OLD: Is he on probation?

18 MR. TOWNSEND: I believe he's
19 a convicted felon, that is information that I can get to
20 you, you know, by tomorrow at the latest.

21 I don't believe he's on -- currently on
22 probation. I think he's either currently on -- or
23 currently, you know, out. I don't believe he's in jail
24 anywhere at this time. I don't know where he is. I
25 don't have an address on him.

1 MR. OLD: As to the witness
2 Tonya Fulfer, would it be permissible, Your Honor, for
3 me to inquire when this deal was made?

4 THE COURT: You may.

5 MR. TOWNSEND: I think the
6 deal was made, you know, her attorney and I have talked
7 about it back and forth for some time.

8 I think to say when the final deal was
9 made, I guess it would have been two or three weeks ago.

10 MR. OLD: Your Honor, I don't
11 have this letter with me, it's still on my desk but it
12 was dated last week.

13 MR. TOWNSEND: Yes. We mailed
14 the letter one day last week I am sure.

15 MR. OLD: That is pretty slow
16 compliance to a letter of discovery right down to the
17 point of being surprised and her being -- not being a
18 witness in this case or listed as one is one that I have
19 made decisions on as voir direing the jury, the extent
20 that I would voir dire them on certain things.

21 I am entitled to rely on their witnesses
22 that they designate them.

23 Our original discovery motions which
24 were filed months ago requested whether or not there had
25 been a deal made. That puts a different light on how we

1 are going to go forward, not only in selecting a jury,
2 voir diring the jury on the law that applies to such
3 witnesses commonly known as the "Accomplice Witness Rule"
4 and we had not anticipated doing that.

5 It also puts our anticipated trial plan
6 into a different light and it appears to me that the
7 State, having made a deal several weeks ago and not
8 informing us until last week has surprised us with that
9 information and that we are not playing on level playing
10 field and this is an unfair tactic and we would request
11 that if this trial is going to go forward without recess
12 then the name of Tonya Fulfer be struck from the Witness
13 List and they be ordered not to call her as a witness.

14 THE COURT: Mr. Townsend, has
15 Miss Fulfer pled guilty yet?

16 MR. TOWNSEND: No.

17 THE COURT: Do you have any
18 agreement in writing between you, her attorney and her?

19 MR. TOWNSEND: I believe we
20 did -- yes. We do.

21 THE COURT: When was that
22 agreement reduced to writing and signed by all parties?
23 When did you get the last signature on the agreement?

24 MR. TOWNSEND: I think I wrote
25 a letter to Mac Cobb, it has been maybe a couple of

1 months ago and then subsequent to that the letter was
2 just a letter saying this is what we agreed to do. It's
3 not a matter of having signatures on it or anything.

4 Subsequent to that Mac and I have had
5 verbal conversations where he and I agreed that that
6 would be our agreement. We do not have signatures, it
7 is not reduced to writing, it's just Mac and I have known
8 each other for a long time, I trust his word, he trusts
9 mine. That's the sort of agreement we have. We do not
10 have an agreement in writing where she has signed it or
11 he has signed it or I have signed.

12 THE COURT: Does the agreement
13 contemplate that Miss Fulfer will enter her plea before
14 or after this trial begins?

15 MR. TOWNSEND: It will be
16 after -- after this trial is over.

17 Actually, Your Honor, I don't anticipate
18 using her as a witness but there is some small
19 possibility of that.

20 THE COURT: With her on the
21 Witness List I certainly think that Mr. Old has a right
22 to request for a continuance.

23 I'm not going to grant the request to
24 strike her from the Witness List. I have already denied
25 the Motion for a Mistrial.

1 I do believe that since the State has
2 in essence has an ongoing discussion concerning this
3 agreement that the supplementing of the Witness List at
4 this time is not such a great surprise that it works such
5 a hardship on the Defense that we can't go forward but
6 I do believe the Defense has a right to reasonable time
7 to either interview Miss Fulfer or reevaluate their
8 approach on voir dire and for trial.

9 Now, as far as Mr. Stewart is concerned;
10 since the State does not even know where he is I'm not
11 concerned with any recess necessary to find or talk to
12 Mr. Stewart.

13 If Mr. McKinney is -- is in TDC I
14 certainly think that he could be contacted even though
15 you are going to have to go to Huntsville to do it and
16 obviously you will need some time to do that.

17 So what I'm going to do right now is to
18 recess until 1:00 o'clock, at 1:00 o'clock I want both
19 parties, meaning lawyers, back here.

20 In the meantime I want Mr. Townsend to
21 try to find out the whereabouts of Mr. Stewart and Mr.
22 McKinney and find out what they are charged with, what
23 kind of records they have and provide that information
24 to the Defense.

25 I'm not going to order the State right

1 now to divulge the contents of the testimony that -- the
2 testimony that the State intends to elicit, I would
3 request that Mr. Townsend reveal that information if he
4 thinks he can do so without jeopardizing his case. If
5 Mr. Townsend will not reveal the incident that Mr.
6 Stewart and Mr. McKinney will testify about then I will
7 order Mr. Townsend to so inform the Court in an in-camera
8 hearing out of the Defense's presence.

9 Mr. Townsend?

10 MR. TOWNSEND: Your Honor, Mr.
11 Old has an Offense Report that would indicate what their
12 testimony would be, if he does not have that I would be
13 glad to provide that.

14 Do you recall the situation I'm talking
15 about?

16 MR. OLD: Well, I have got
17 about three spiral notebooks full of discovery material
18 and I will be honest with the Court, I think I know what
19 he's talking about but I'm not sure.

20 THE COURT: Let's get a copy
21 of the Offense Report and tender it to Mr. Old either in
22 the afternoon or in the morning so he can be fully
23 apprised of the incident that these two witnesses will
24 reveal in Court.

25 Now, back to the length of the delay,

1 at 1:00 o'clock today, Mr. Old, I want you to tell me
2 whether you are ready to proceed or whether you are going
3 to need some more time and if so how much time do you
4 think you will need.

5 MR. OLD: Your Honor, may I
6 indulge the Court?

7 There was another thing submitted to me,
8 I want to make an objection on it, I think it would
9 probably be best to take it up at this time.

10 THE COURT: You may proceed.

11 MR. OLD: This morning at
12 around 10:00 o'clock prior to our 10:30 setting I
13 received from Mr. Townsend a piece of paper entitled
14 "Punishment Evidence."

15 I would like to have a copy of it marked
16 as "Exhibit 2" and for purposes of the record, Your
17 Honor, can I have a copy of the Witness List or note they
18 tendered me, can I have it marked as "Exhibit 1?"

19 THE COURT: You may.

20
21 (Voir Dire Exhibit Numbers 1 and 2 were
22 marked for identification.)

23
24 MR. OLD: Your Honor, we would
25 offer Exhibits 1 and 2 at this time and ask they be

1 received.

2 THE COURT: Mr. Townsend?

3 MR. TOWNSEND: No objection.

4 THE COURT: Both of the
5 exhibits are admitted as Voir Dire Exhibits 1 and 2.

6
7 (Voir Dire Exhibit Numbers 1 and 2 were
8 received in evidence.)

9
10 MR. OLD: Your Honor, what I
11 was told about this document, it purports to be
12 extraneous offenses which the State intends to offer at
13 the punishment phase of this trial.

14 By our discovery motion filed February
15 7th of this year a written specification of all prior
16 misconduct and evidence of extraneous offenses which the
17 State intends to use against the Defendant which
18 specification should include the date, time, place and
19 nature of such misconduct and/or extraneous offenses in
20 order to fully apprise and notify the Defendant of all
21 such evidence and thus present opportunity to challenge
22 if a challenge is relevant as to materiality and
23 probative value to trial and to prepare a defense as to
24 such State's evidence.

25 That order was granted by Judge Thorpe

1 5/18/94, his order is handwritten at the bottom of the
2 motion if I am reading it correctly and if Mr. Townsend
3 wants to read over my shoulder and correct me that's
4 fine, Judge.

"Granted by agreement."

12 MR. OLD: I think it's "If the
13 State seeks to object to any probative item, must bring
14 it to attention of Court within two weeks of this order.
15 If State's response to request is that no such evidence
16 exists or is not in their possession such notation should
17 be made."

18 THE COURT: Go off the record.

20 (Off the record discussion.)

1 reflect -- I'm sure the record will reflect that Judge
2 Thorpe was originally assigned to hear this case and
3 because of a personal tragedy that occurred in Judge
4 Thorpe's family he asked to be removed from this case
5 shortly after the time I think that most of these orders
6 were entered.

7 After that occurred I was assigned to
8 this case and the first appearance I made was last
9 Thursday which would have been October the 6th.

10 I have reviewed the file but I'm not
11 familiar with each and every order, the way I view the
12 order of May 18th the State has two weeks from May 18th
13 to object to Judge Thorpe's ordering the State to reveal
14 the information requested in the Motion for Discovery and
15 Inspection of Evidence.

16 I do not see anything in writing from
17 the State so I assume the State does not have an
18 objection to revealing whatever is ordered to be revealed
19 by that motion.

20 So we get down to the question of
21 whether or not there has been an adequate or sufficient
22 time and notice given to the Defense.

23 Now, Mr. Townsend, do you have any
24 statement you wish to make concerning where you are in
25 revealing to Mr. Old all of the evidence that you have

1 been ordered to reveal?

2 In other words, do we have more
3 surprises? Do we have anymore evidence that has not been
4 tendered that you anticipate tendering or delivering?

5 MR. TOWNSEND: Nothing more
6 than that I anticipate that letter there I think would
7 be the punishment evidence so far as extraneous offenses,
8 bad acts, and I would say that I believe when I -- I may
9 have only supplied Mr. Old with that list this morning,
10 I have supplied him with Offense Reports and Officer's
11 Reports and that sort of thing that relate to those
12 incidents and those were supplied to him a good while
13 ago other than maybe a couple of items that have been
14 maybe occurred in the last few weeks and they were
15 supplied to him as quickly as I got them.

16 That's the formalized list of things,
17 I handwrote that out yesterday, gave it to him this
18 morning and I will get a formal list, letter on this
19 later but the actual instances themselves he has had
20 knowledge of for quite some time.

21 THE COURT: Mr. Old, do you
22 have any other motions or objections to any of the
23 proceedings or failure to comply with orders?

24 MR. OLD: Not to my knowledge
25 at this time, Your Honor.

1 THE COURT: We are going to
2 recess until 9:00 a.m. tomorrow morning.

17 You have waived any objection by not
18 objecting so comply with that order by tomorrow morning
19 by 9:00 a.m.

1 dire to cover those three witnesses.

2 If you have in good faith a need for
3 more time I will grant you more time, if you don't then
4 I intend to proceed tomorrow morning.

7 MR. TOWNSEND: I have no
8 objection, Your Honor.

9 Just for clarification, though; what
10 -- the punishment evidence, I -- I think I'm clear on
11 what you want me to do so far as -- and I think Bird
12 knows, he has been straight forward about it, I think he
13 knows what the punishment evidence is. I have no problem
14 preparing that.

18 THE COURT: Let me go back to
19 that order.

(Off the record discussion.)

23 THE COURT: Back on the
24 record.

I have pieced together what I believe

1 is the Motion for Discovery, Production and Inspection
2 of Evidence No. 1 filed on February 7th, 1994. I have
3 provided a copy of that motion and order to both the
4 State and Defense.

5 Mr. Townsend, I want you to be prepared
6 at 9:00 in the morning to either comply with this motion
7 in writing with a letter handed to Mr. Old together with
8 all of any relevant documents requested or I want you to
9 be prepared to state into the record the fact that you
10 do or do not have such evidence requested and to detail
11 the evidence on the record.

12 I will leave it up to you as to which
13 way you wish to proceed.

14 If you have any printed documents that
15 will be made part of this case that are covered by that
16 motion make copies of those written documents for Mr. Old
17 to review. If you believe that any of the inquiries have
18 to do with work product then we will take up tomorrow
19 morning. I think if such an objection happens to arise,
20 and I realize, Mr. Old, that Judge Thorpe stated he must
21 object within two weeks but I will entertain an objection
22 concerning work product if there is a possible work
23 product problem.

24 And Mr. Townsend is shaking his head so
25 I anticipate that will not come up.

1 Now then, Mr. Townsend, are you clear
2 on what I want tomorrow?

3 MR. TOWNSEND: I believe I am.

4 THE COURT: Mr. Old, do you
5 have anymore requests for today?

6 MR. OLD: No.

7 THE COURT: Mr. Hinson, do you
8 have any requests?

9 MR. HINSON: No.

10 THE COURT: Then we are in
11 recess.

12 (Record closed for October 11th, 1994.)

13
14 (Whereupon Court was recessed until 9:00
15 a.m., October 12th, 1994.)

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1 STATE OF TEXAS \$
2 COUNTY OF TITUS \$

3
4 I, Lloyd E. Billups, CSR #149 and
5 Official Court Reporter in and for the 76th Judicial
6 District, State of Texas, do hereby certify that the
7 above and foregoing contains a true and correct
8 transcription of the proceedings in the above-styled and
9 numbered cause, all of which occurred in open court or
10 in chambers on October 11, 1994 and were reported by me.

11 I further certify that this
12 transcription of the record of the proceedings truly and
13 correctly reflects the exhibits, if any, offered by the
14 respective parties.

15 WITNESS MY HAND this 31st day of
16 January, 1995.

17 
18 LLOYD E. BILLUPS, CSR #149 & OFFICIAL COURT REPORTER
19 76TH JUDICIAL DISTRICT, STATE OF TEXAS

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1 Certification Number of Reporter: 149
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